

hours standard is 40 hours and the specified regular rate is \$5 an hour the weekly guaranty cannot be greater than \$350. This does not mean that an employee employed pursuant to a guaranteed pay contract under this section may not work more than 60 hours in any week; it means merely that pay in an amount sufficient to compensate for a greater number of hours cannot be covered by the guaranteed pay. If he works in excess of 60 hours he must be paid, for each hour worked in excess of 60, overtime compensation as provided in the contract, in addition to the guaranteed amount.

[46 FR 7317, Jan. 23, 1981]

§ 778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.

While the guaranteed pay may not cover more than 60 hours, the contract may guarantee pay for a lesser number of hours. In order for a contract to qualify as a bona fide contract for an employee whose duties necessitate irregular hours of work, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be wholly fictitious and therefore would not be a "regular rate" as discussed above. When the parties enter into a guaranteed pay contract, therefore, they should determine, as far as possible, the range of hours the employee is likely to work. In deciding the amount of the guaranty they should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks. In both *Walling v. A. H. Belo Co.*, 316 U.S. 624 and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 the court found that the employees did ac-

tually exceed the number of hours (60 and 84 respectively) for which pay was guaranteed on fairly frequent occasions so that the hourly rate stipulated in the contract in each case was often operative and did actually control the compensation received by the employees. In cases where the guaranteed number of hours has not been exceeded in a significant number of workweeks, this fact will be weighed in the light of all the other facts and circumstances pertinent to the agreement before reaching a conclusion as to its effect on the validity of the pay arrangement. By a periodic review of the actual operation of the contract the employer can determine whether a stipulated contract rate reasonably expected by the parties to be operative in a significant number of workweeks is actually so operative or whether adjustments in the contract are necessary to ensure such an operative rate.

§ 778.413 Guaranty must be based on rates specified in contract.

The guaranty of pay must be "based on the rate so specified," in the contract. If the contract specifies a regular rate of \$5 and an overtime rate of \$7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be \$275, if it is to be based on the rates so specified. A guaranty of \$290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, \$290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

[46 FR 7318, Jan. 23, 1981]

§ 778.414 "Approval" of contracts under section 7(f).

(a) There is no requirement that a contract, to qualify under section 7(f), must be approved by the Secretary of

Labor or the Administrator. The question of whether a contract which purports to qualify an employee for exemption under section 7(f) meets the requirements is a matter for determination by the courts. This determination will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder. It will turn on the question of whether the duties of the employee in fact necessitate irregular hours, whether the rate specified in the contract is a "regular rate"—that is, whether it was designed to be actually operative in determining the employee's compensation—whether the contract was entered into in good faith, whether the guaranty of pay is in fact based on the regular and overtime rates specified in the contract. While the Administrator does have the authority to issue an advisory opinion as to whether or not a pay arrangement accords with the requirements of section 7(f) he can do so only if he has knowledge of these facts.

(b) As a guide to employers, it may be helpful to describe a fact situation in which the making of a guaranteed salary contract would be appropriate and to set forth the terms of a contract which would comply, in the circumstances described, with the provisions of section 7(f).

Example: An employee is employed as an insurance claims adjuster; because of the fact that he must visit claimants and witnesses at their convenience, it is impossible for him or his employer to control the hours which he must work to perform his duties. During the past 6 months his weekly hours of work have varied from a low of 30 hours to a high of 58 hours. His average workweek for the period was 48 hours. In about 80 percent of the workweeks he worked less than 52 hours. It is expected that his hours of work will continue to follow this pattern. The parties agree upon a regular rate of \$5 per hour. In order to provide for the employee the security of a regular weekly income the parties further agree to enter into a contract which provides a weekly guaranty of pay. If the applicable maximum hours standard is 40 hours, guaranty of pay for a workweek somewhere between 48 hours (his average week) and 52 would be reasonable. In the circumstances described the following contract would be appropriate.

The X Company hereby agrees to employ John Doe as a claims adjuster at a regular hourly rate of pay of \$5 per hour for the first

40 hours in any workweek and at the rate of \$7.50 per hour for all hours in excess of 40 in any workweek, with a guarantee that John Doe will receive, in any week in which he performs any work for the company, the sum of \$275 as total compensation, for all work performed up to and including 50 hours in such workweek.

(c) The situation described in paragraph (b) of this section is merely an example and nothing herein is intended to imply that contracts which differ from the example will not meet the requirements of section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

COMPUTING OVERTIME PAY ON THE RATE APPLICABLE TO THE TYPE OF WORK PERFORMED IN OVERTIME HOURS (SECS. 7(g) (1) AND (2))

§ 778.415 The statutory provisions.

Sections 7(g) (1) and (2) of the Act provide:

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection:

(1) In the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) In the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours;

* * * * *

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.